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No. 95-793

In The

Supreme Court of the United States

October Term, 1995

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, and
CSX TRANSPORTATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Petitioner, American Train Dispatchers Association (ATDA), makes this reply to new points raised in the opposition briefs by the Government (Govt. Br.), and by CSX Transportation, Inc. (CSXT Br.). Rule 15.6.

1. *Compulsory arbitration.* The Government misstates the statutory background and agency regulations involved in resolving disputes which, as here, are concerned with the statutory minimum guarantees for railroad employees involved in carrier consolidations. (Govt. Br. 2-3).

The Govt. asks the Court to uphold the Interstate Commerce Commission (ICC),[1] in referring to mandatory arbitration employee protection matters, including minimum compensation. The Govt. relies upon an arbitration requirement for implementing agreements involving "selection of forces" and "assignment of employees" in carrying out ICC-approved consolidations under the so-called *New York Dock (NYD)* conditions,[2] citing *United Transp. Union v. United States*, 905 F.2d 463 (D.C. Cir. 1990) — an implementing agreement matter under *NYD*, Article I, § 4. (Govt. Br. 7). The Govt. also analogizes with arbitration under employee conditions imposed by the former Civil Aeronautics Board (CAB) for airline mergers, citing *Wallace v. CAB*, 755 F.2d 861 (11th Cir. 1985). (Govt. Br. 10).

The Govt. is in error. Until now, the ICC has distinguished between disputes involving the statutory minimum guarantee, under 49 U.S.C. 11347, where the ICC would itself determine the compensation requirement, and disputes involving other, often non-compensatory, aspects of the *NYD* conditions, which the ICC will refer to arbitration. The requirement for initial ICC determination, rather than arbitration, in minimum compensation cases is bottomed upon this Court's decision in *Norfolk and Western Railway Company v. Nemitz*, 404 U.S. 37 (1971). *Initial Decision*, Pet. App. 42a-43a:

> By contrast, the Commission itself has determined, as a general matter, whether the compensation received by employees satisfy statutory minimum levels and decided complaints on employee eligibility for labor protection.

See also: Pet. 12-13; *Leavens v. Burlington Northern*, 348 I.C.C. 962, 973-80 (1977).

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[1]Now, Surface Transportation Board. (Govt. Br. 2 n.1).

[2]*New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60, *aff'd New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir. 1979).

The compulsory arbitration process involved in arriving at an implementing agreement under *NYD*, Article I, § 4, is simply not comparable with agency resolution of minimum statutory guarantees, under *NYD*, Article I, § 5(a). 360 I.C.C. at 85, 86. Moreover, analogy with air carrier mergers approved by the former CAB is inapposite. Unlike the railroad industry, employee protection in the airline industry was prescribed by the CAB under its general "public interest" standard, without a specific statutory protective provision. *Cf.* 49 U.S.C. 1378(b) (1970), 49 U.S.C. 11347 (1988). *Kent v. Civil Aeronautics Board*, 204 F.2d 263, 265 (2d Cir. 1953), *cert. den.* 346 U.S. 826; *American Airlines, Inc. v. CAB*, 445 F.2d 891, 893 (2d Cir. 1971). *cert. den.* 404 U.S. 1015; *Delta Air Lines, Inc. v. CAB*, 574 F.2d 546, 549-50 (D.C. Cir. 1978), *cert. den.* 439 U.S. 819; *Independent Union v. United States Dept. of Transp.*, 803 F.2d 1029 (11th Cir. 1986).

2. *Standard of Review.* The majority opinion initially appears to acknowledge (Pet. App. 10a-11a), and the dissenting opinion does recognize (Pet. App. 22a & n.1), that the standard governing judicial review of an agency's interpretation of its own regulation differs from judicial review of an agency's interpretation of a statutory term. The Govt. now argues to the contrary, and asserts the same principles should apply when an agency is harmonizing disparate provisions of a statute, as when the agency is harmonizing provisions of its own rules or regulations, with even greater deference to interpretation of regulations than of statutes, citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965). (Govt. Br. 8, 9).

The Govt. is incorrect. The dissenting opinion sets forth the proper standard for review. (Pet. 22a & n.1). Agency interpretation of a statutory term is governed by *Chevron USA v. NRDC*, 367 U.S. 837, 842-44 (1984), and its progeny. Once an agency has made an interpretation of the statute, has

issued regulations thereunder, and next interprets the regulation, it is governed by a more demanding requirement. If the meaning of the ICC's words in its regulations are doubtful, its interpretation will be set aside if "plainly erroneous" or "inconsistent with the regulation." See case citations in dissenting opinion. (Pet. App. 22 & n.1). Here, the ICC's interpretation of "12 months" and "total compensation" does not deal with words which are susceptible of doubt, and the ICC's interpretation of "12 months" to mean "8 months," and "total compensation" to embrace something less than total compensation, is inconsistent with the very regulation which says "12 months" and "total compensation." Of course, the agency is not without a remedy, for it can change its regulations for the future, as the dissent notes. (Pet. App. 28a-29a).

The standard suggested by the majority is perhaps not as bold as that urged by the Government, although the majority would revise language in the Court's opinions to equate "regulatory" with "statutory," and make other changes.[3] The majority would defer to the ICC's interpretation of its own regulations only where the meaning is "doubtful" or "ambiguous." (Pet. App. 11a). But contrary to the Govt. (Govt. Br. 9), the ICC did not find *NYD*, Article I, § 5(a) to be ambiguous, and the ICC did not find it "doubtful."[4] Rather, the

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[3]The Government notes that one citation error in the slip opinion was corrected in the printed version. (Govt. Br. 8 n.4). Petitioner's research indicates the change was made from the printed advance reports by West Publishing Co. to the printed bound copy, sometime in September 1995. To be sure, "scheme" has been replaced with "term" in citation to *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454 (1989), but this change, alone, is not sufficient, and does not answer to the matter of *Northern Ind. Pub. Serv. Co. v. Walton League*, 423 U.S. 12 (1975). (Pet. 16-17).

[4]Likewise, CSXT errs in asserting the ICC found section 5(a) ambiguous. (CXST Br. 17). To the contrary, neither the majority nor the dissenting opinions claimed the ICC found "ambiguity." It was the majority opinion which first found "ambiguity." (Pet. App. 12a, 14a).

ICC considered section 5(a) to be contrary to the overall policy of *NYD* as expressed in another provision, Article I, § 1(b). 9 I.C.C.2d at 1134. (Pet. App. 59a).

The Government's repeated reliance upon *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Govt. Br. 8, 9) overlooks the nature of the case as involving an agency's contemporaneous construction of a statute. The Court's opinion does not deviate from the standard that the agency first find the meaning of words used to be in doubt, with the agency then governed by the "plainly erroneous" or "inconsistent with the regulation" test to determine the validity of its interpretation of its own regulation. Indeed, the dissenting opinion expressly relies upon *Udall v. Tallman* (Pet. App. 22a), among other authorities.

Respectfully submitted,

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